A

**MAZITA MD KHIR JOHARI**

**v.**

**HAMDAN RASUL**

B

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S3-22-790-2000]
20 JANUARY 2008

C ***LAND LAW:*** *Sale of land - Validity of agreement - Vacant possession - Matrimonial home - Parties divorced and defendant adjudged bankrupt - Defendant's share in property vested in Official Assignee - Whether manner of sale and terms of agreement contravened Syariah Court's consent order made in respect of matrimonial home - Consideration -* D *Contrary to public policy - Whether Official Assignee bound by Syariah Court order - Proper remedy for defendant against Official Assignee*

***ISLAMIC LAW:*** *Matrimonial property - Jointly acquired property - Parties divorced and defendant adjudged bankrupt - Defendant's share in* E *property vested in Official Assignee - Vacant possession - Sale and purchase agreement - Whether lawful - Whether contravened terms of Syariah Court's consent order made in respect of matrimonial home - Consideration - Contrary to public policy - Whether Official Assignee bound by Syariah Court order - Proper remedy for defendant against* F *Official Assignee*

***CONTRACT:*** *Sale and purchase of land - Validity of agreement - Vacant possession - Matrimonial home - Parties divorced and defendant adjudged bankrupt - Defendant's share in property vested in Official Assignee - Whether manner of sale and terms of agreement contravened* G *Syariah Court's consent order made in respect of matrimonial home - Consideration - Contrary to public policy - Whether Official Assignee bound by Syariah Court order - Proper remedy for defendant against Official Assignee*

H ***BANKRUPTCY:*** *Sale and purchase of land - Validity of agreement - Vacant possession - Matrimonial home - Parties divorced and defendant adjudged bankrupt - Defendant's share in property vested in Official Assignee - Whether manner of sale and terms of agreement contravened Syariah Court's consent order made in respect of matrimonial home -* I *Consideration - Contrary to public policy - Whether Official Assignee bound by Syariah Court order - Proper remedy for defendant against Official Assignee*

The plaintiff in this writ action sought an order of this court to the effect that the defendant vacates a house (once the matrimonial home of the parties and now the subject matter of the case) within seven days of the service of the court's order. The defendant counterclaimed against the plaintiff seeking a declaration that a sale and purchase agreement dated 16 June 1998 entered into between the plaintiff and the Official Assignee ('OA') was void. The parties were once married but now divorced. On 26 August 1988, the Syariah Court made a consent order in respect of the matrimonial home, which had been jointly purchased by the plaintiff and the defendant while they were still husband and wife. Subsequent to the consent order, the defendant was adjudged a bankrupt and by operation of law, his half share in the property vested in the OA. The plaintiff, on 16 June 1998, entered into a sale and purchase agreement with the OA to purchase the defendant's half share in the house. One of the terms of the sale and purchase agreement was that the purchase price was to be paid by the plaintiff to the OA upon delivery of vacant possession of the half undivided share in the house by the OA to the plaintiff. The OA then issued several notices to the defendant asking him to vacate the house but he refused to do so, contending that the sale and purchase agreement was void as the manner of the sale and the terms of the agreement contravened the terms of the Syariah Court order dated 26 August 1988. He submitted that the sale and purchase agreement was contrary to public policy and, thus, unlawful and void by reason of s. 24(e) of the Contracts Act 1950. The plaintiff however, relying on s. 85(4) of the Bankruptcy Act 1967 ('Act'), averred that the OA, in dealing with the defendant's property, was not bound by the Syariah Court's order.

**Held (dismissing both the plaintiff's action and the defendant's counterclaim):**

**(1)** According to the consent order dated 26 August 1998 made by the Syariah Court: (i) the whole house must be sold; (ii) it must be sold through the services of a real estate agent; (iii) for the purpose of the sale and purchase transaction, both plaintiff and defendant must engage the services of a solicitor; and (iv) the house must be sold at market price. With regard to (i), the sale and purchase agreement between the plaintiff and the OA only referred to the half share of the plaintiff instead of the whole house. In respect of (ii),

A the word "broker" used by the Syariah Court in the order must be interpreted to refer to a real estate agent. In the present case, no real estate agent was employed. With regard to (iv), the words "dengan harga yang paling tinggi" should be read to mean that the house must be sold at the
B market price. It should not be read as requiring the house to be sold to "the highest bidder" since the Syariah Court's order did not decree that the house must be sold by way of public auction or by a public auctioneer. Instead, it merely mentioned "broker", meaning a real estate agent. In the
C instant case, the defendant's half share was not sold by way of a public auction. However, at the same time, there was no evidence to show that the defendant's half share was sold to the plaintiff under the agreement at the prevailing market price. There was no valuation report prepared by a
D qualified valuer tendered to court to show the market value of the house at the time the agreement was entered into. On the facts, the manner of the sale of the house as well as the terms of the sale and purchase agreement were clearly contrary to the order of the Syariah Court dated 26 August
E 1988. That being the case, the object of the agreement was unlawful as being opposed to public policy. Hence, the agreement was unlawful and void. (paras 12, 13, 14, 15, 16, 17, 18, 19 & 20)

F **(1a)** There was no reason why the OA was not bound by the order of the Syariah Court. If the house were sold in accordance with the Syariah Court's order, the defendant's half share in the proceeds of the sale would still vest in the OA. (para 22)

G **(1b)** The defendant's remedy should have been by way of an appeal to the Bankruptcy Court pursuant to s. 86 of the Act and not by way of seeking a declaration as was done by the defendant in the present case. (para 23)

H **Legislation referred to:**
Bankruptcy Act 1967, ss. 24(4), 85(4), 86
Contracts Act 1950, s. 24(e)

*For the plaintiff - K Maniam; M/s Skrine*
*For the defendant - Azhar Arman; M/s Arman Yunos*
I

*Reported by Suresh Nathan*

## JUDGMENT

**Hishamudin Mohd Yunus J:**

**[1]** In this writ action the plaintiff seeks an order of this court to the effect that the defendant vacates a house (once the matrimonial home of the parties and now the subject matter of the case) within seven days of the service of the order of the court.

**[2]** The defendant counterclaims against the plaintiff seeking a declaration that the sale and purchase agreement dated 16 June 1998 entered into between the plaintiff and the official assignee is void.

**[3]** I have dismissed the plaintiff's action with costs. I have also dismissed the defendant's counter-claim but with no order as to costs.

**[4]** I shall set out the facts of the case. The plaintiff and defendant were once husband and wife. They are now divorced. On 26 August 1988 the Syariah Court of Kuala Lumpur made the following consent order in respect of the matrimonial home (which is the subject matter of this suit):

> 1. Rumah di alamat No: 11, Jalan 1/1, Taman Tun Abdul Razak, Ampang, Selangor adalah harta sepencarian bersama dan hendaklah dijual dan hasilnya dibahagi dua sama banyak. Seorang broker hendaklah dilantik untuk menguruskan penjualan rumah tersebut dengan harga yang paling tinggi bagi menafaat bersama dan kos ditanggung oleh kedua-dua pihak.
>
> 2. Kedua-dua belah pihak hendaklah melantik seorang peguam untuk mengendalikan penjualan rumah tersebut.
>
> 3. [not relevant]

**[5]** Subsequent to the above order of the Syariah Court, the defendant was adjudged a bankrupt. The adjudicating order and receiving order were made against him by the bankruptcy court on 31 October 1988. He is currently occupying the house (the subject matter of this case) with his present wife.

**[6]** The house was jointly purchased by the plaintiff and the defendant way back in 20 November 1982 while they were still husband and wife. It became their matrimonial home.

**[7]** After the defendant was adjudicated a bankrupt, by operation of law (see s. 24(4) of the Bankruptcy Act 1967) the defendant's half share in the property (house) vests in the official assignee.

**[8]** The plaintiff was desirous of purchasing the defendant's half share in the property (house). So after negotiating with the office of the official assignee, on 16 June 1998, she entered into a sale and purchase agreement with the official assignee to purchase the defendant's half share (now vested in the official assignee) in the house. Under the agreement, the purchase price for the half share is RM102,500. Upon signing the agreement, the plaintiff paid a deposit of RM10,250 to the official assignee. The balance purchase price is RM92,250.

**[9]** One of the terms of the sale and purchase agreement is that the purchase price is to be paid by the plaintiff to the official assignee upon delivery of vacant possession of the half undivided share in the house by the official assignee to the plaintiff.

**[10]** The official assignee had issued several notices to the defendant asking the defendant to vacate the house, but the defendant refused to do so.

**[11]** The defendant contends that the sale and purchase agreement entered into between the plaintiff and the official assignee is void as the manner of the sale and the terms of the sale and purchase agreement contravene the terms of the order of the Syariah Court of 26 August 1988. The learned counsel submits that the sale and purchase agreement is contrary to public policy and hence unlawful and void by reason of s. 24(e) of the Contracts Act 1950.

**[12]** I shall now explain my grounds for dismissing the plaintiff's claim. In my judgment it would not be right for this court to make an order for vacant possession of the house. I so hold because in my view the sale and purchase agreement entered into between the plaintiff and the official assignee is void. The agreement is void because the manner of the sale and the terms of the sale and

purchase agreement are not in accordance with the consent order dated 26 August 1988. According to the order of the Syariah Court:

(1) the whole house must be sold;

(2) it must be sold through the service of a real estate agent;

(3) for the purpose of the sale and purchase transaction, both plaintiff and defendant must engage the service of a solicitor; and

(4) the house must be sold at the market price.

**[13]** With regard to limb (1) above, the sale and purchase agreement between the plaintiff and the official assignee only refers to the half share of the plaintiff instead of to the whole house.

**[14]** With regard to limb (2) above, the Syariah Court's order uses the word:

> Seorang broker hendaklah dilantik …

**[15]** In my view the word 'broker' here must be interpreted to refer to a real estate agent. In the present case, however, no real estate agent was employed.

**[16]** With regard to limb (4) above, the Syariah Court order contains the words:

> … dengan harga yang paling tinggi …

**[17]** These words should be read to mean that the house must be sold at the market price. It should not be read as requiring the house to be sold to 'the highest bidder' as the Syariah Court's order does not decree that the house must be sold by way of public auction or by a public auctioneer. Instead it merely mentions 'broker' which I have interpreted to mean a real estate agent.

**[18]** In the present case, the defendant's half share is not sold by way of a public auction. However, at the same time, there is no evidence to show that the defendant's half share was sold to the plaintiff under the agreement at the prevailing market price. There is no valuation report prepared by a qualified valuer

tendered to court to show the market value of the house at the time the agreement was entered into (15 June 1998). Contrary to the evidence of the plaintiff in Question and Answer 15 of her witness statement, p. 60 of Bundle A is not a letter from the Valuation Department to the official assignee. It is merely a letter from the official assignee to the plaintiff's solicitors, Messrs Skrine & Co.

**[19]** Section 24 of the Contracts Act stipulates:

> **24. What considerations and objects are lawful, and what not**
>
> The consideration or object of an agreement is lawful unless:
>
> (a) …
>
> …
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

**[20]** In my judgment, the manner of the sale of the house as well as the terms of the sale and purchase agreement is clearly contrary to the order of the Syariah Court dated 26 August 1988. This being the case, it can be said that the object of the agreement is unlawful as being opposed to public policy. Hence the agreement is unlawful and void.

**[21]** The learned counsel for the plaintiff submits that the official assignee in dealing with the property of the defendant is not bound by the order of the Syariah Court of 26 August 1988. Counsel relies on s. 85(4) of the Bankruptcy Act which provides:

> (4) Subject to this Act, the Official Assignee shall use his own discretion in the administration of the property of the bankrupt.

**[22]** With respect I am unable to agree with this view. I see no reason why the official assignee is not bound by the order of the Syariah Court. If the house is sold in accordance with the order of the Syariah Court, the defendant's half share in the proceeds of the sale will still vest in the official assignee.

**[23]** To repeat what has been said at the beginning of this judgment, I have also dismissed the defendant's counter-claim. I am in agreement with the submission of the leaned counsel for the plaintiff that the defendant's remedy should have been by way of an appeal to the bankruptcy court pursuant to s. 86 of the Bankruptcy Act and not by way of seeking a declaration as is done by the defendant in the present case. Section 86 provides:

> **Appeal to Court against Official Assignee**
>
> 86. If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Official Assignee, he may apply to the Court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

**[24]** As I have ruled that the sale and purchase agreement is void, therefore, I am not making any order as to costs in respect of the counter-claim.

[Plaintiff's claim dismissed with costs; defendant's counter-claim dismissed with no order as to costs.]